

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

OLIVIA R. HOLMAN,

Plaintiff,

v.

ANDREW SAUL,

Defendant.

Case No. 2:18-cv-02334-JCM-NJK

REPORT AND RECOMMENDATION

(Docket Nos. 18, 21)

This case involves judicial review of administrative action by the Commissioner of Social Security (“Commissioner”) denying Plaintiff’s application for disability insurance benefits and supplemental security income pursuant to Titles II and XVI of the Social Security Act. The Court has considered Plaintiff’s motion for remand, the Commissioner’s response, the Commissioner’s counter-motion to affirm, and Plaintiff’s reply. Docket Nos. 18¹, 21, 22, 24. This action was referred to the undersigned magistrate judge for a report of findings and recommendation.

I. STANDARDS

A. Judicial Standard of Review

The Court’s review of administrative decisions in social security disability benefits cases is governed by 42 U.S.C. § 405(g). *See Akopyan v. Barnhart*, 296 F.3d 852, 854 (9th Cir. 2002).

¹ The pagination of Docket No. 18 differs from the pagination assigned by CM/ECF. The Court herein cites to the CM/ECF pagination.

1 Section 405(g) provides that, “[a]ny individual, after any final decision of the Commissioner of
2 Social Security made after a hearing to which he was a party, irrespective of the amount in
3 controversy, may obtain a review of such decision by a civil action . . . brought in the district court
4 of the United States for the judicial district in which the plaintiff resides.” The Court may enter,
5 “upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing
6 the decision of the Commissioner of Social Security, with or without remanding the cause for a
7 rehearing.” *Id.*

8 The Commissioner’s findings of fact are deemed conclusive if supported by substantial
9 evidence. 42 U.S.C. § 405(g). To that end, the Court must uphold the Commissioner’s decision
10 denying benefits if the Commissioner applied the proper legal standard and there is substantial
11 evidence in the record as a whole to support the decision. *Webb v. Barnhart*, 433 F.3d 683, 686
12 (9th Cir. 2005). The Ninth Circuit defines substantial evidence as “more than a mere scintilla but
13 less than a preponderance; it is such relevant evidence as a reasonable mind might accept as
14 adequate to support a conclusion.” *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). In
15 determining whether the Commissioner’s findings are supported by substantial evidence, the Court
16 reviews the administrative record as a whole, weighing both the evidence that supports and the
17 evidence that detracts from the Commissioner’s conclusion. *Reddick v. Chater*, 157 F.3d 715, 720
18 (9th Cir. 1998).

19 Under the substantial evidence test, the Commissioner’s findings must be upheld if
20 supported by inferences reasonably drawn from the record. *Batson v. Comm’r Soc. Sec. Admin.*,
21 359 F.3d 1190, 1193 (9th Cir. 2004). When the evidence will support more than one rational
22 interpretation, the Court must defer to the Commissioner’s interpretation. *Burch v. Barnhart*, 400
23 F.3d 676, 679 (9th Cir. 2005). Consequently, the issue before the Court is not whether the
24 Commissioner could reasonably have reached a different conclusion but whether the final decision
25 is supported by substantial evidence.

26 It is incumbent on the Administrative Law Judge (“ALJ”) to make specific findings so that
27 the Court does not speculate as to the basis of the findings when determining if the Commissioner’s
28 decision is supported by substantial evidence. The ALJ’s findings should be as comprehensive

1 and analytical as feasible and, where appropriate, should include a statement of subordinate factual
2 foundations on which the ultimate factual conclusions are based, so that a reviewing court may
3 know the basis for the decision. *See, e.g., Gonzalez v. Sullivan*, 914 F.2d 1197, 1200 (9th Cir.
4 1990).

5 **B. Disability Evaluation Process**

6 The individual seeking disability benefits bears the initial burden of proving disability.
7 *Roberts v. Shalala*, 66 F.3d 179, 182 (9th Cir. 1995). To meet this burden, the individual must
8 demonstrate the “inability to engage in any substantial gainful activity by reason of any medically
9 determinable physical or mental impairment which can be expected . . . to last for a continuous
10 period of not less than 12 months.” 42 U.S.C. § 423(d)(1)(A). If the individual establishes an
11 inability to perform his prior work, then the burden shifts to the Commissioner to show that the
12 individual can perform other substantial gainful work that exists in the national economy. *Reddick*,
13 157 F.3d at 721.

14 The ALJ follows a five-step sequential evaluation process in determining whether an
15 individual is disabled. *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987) (citing 20 C.F.R. §§ 404.1520,
16 416.920). If at any step the ALJ determines that he can make a finding of disability or
17 nondisability, a determination will be made, and no further evaluation is required. *See Barnhart*
18 *v. Thomas*, 540 U.S. 20, 24 (2003); *see also* 20 C.F.R. § 416.920(a)(4). The first step requires the
19 ALJ to determine whether the individual is currently engaging in substantial gainful activity
20 (“SGA”). 20 C.F.R. § 416.920(b). SGA is defined as work activity that is both substantial and
21 gainful; it involves doing significant physical or mental activities usually for pay or profit. 20
22 C.F.R. § 416.972(a)-(b). If the individual is currently engaging in SGA, then a finding of not
23 disabled is made. If the individual is not engaging in SGA, then the analysis proceeds to the second
24 step.

25 The second step addresses whether the individual has a medically determinable impairment
26 that is severe or a combination of impairments that significantly limits him from performing basic
27 work activities. 20 C.F.R. § 416.920(c). An impairment or combination of impairments is not
28 severe when medical and other evidence establish only a slight abnormality or a combination of

1 slight abnormalities that would have no more than a minimal effect on the individual's ability to
2 work. 20 C.F.R. § 416.922; Social Security Rulings ("SSRs") 85-28 and 16-3p.² If the individual
3 does not have a severe medically determinable impairment or combination of impairments, then a
4 finding of not disabled is made. If the individual has a severe medically determinable impairment
5 or combination of impairments, then the analysis proceeds to the third step.

6 The third step requires the ALJ to determine whether the individual's impairments or
7 combination of impairments meet or medically equal the criteria of an impairment listed in 20
8 C.F.R. Part 404, Subpart P, Appendix 1. 20 C.F.R. §§ 416.920(d), 416.925, 416.926. If the
9 individual's impairment or combination of impairments meet or equal the criteria of a listing and
10 meet the duration requirement (20 C.F.R. § 416.909), then a finding of disabled is made. 20 C.F.R.
11 § 416.920(d). If the individual's impairment or combination of impairments does not meet or
12 equal the criteria of a listing or meet the duration requirement, then the analysis proceeds to the
13 next step.

14 Before considering step four of the sequential evaluation process, the ALJ must first
15 determine the individual's residual functional capacity ("RFC"). 20 C.F.R. § 416.920(e). The
16 RFC is a function-by-function assessment of the individual's ability to do physical and mental
17 work-related activities on a sustained basis despite limitations from impairments. SSR 96-8p. In
18 making this finding, the ALJ must consider all of the symptoms, including pain, and the extent to
19 which the symptoms can reasonably be accepted as consistent with the objective medical evidence
20 and other evidence. 20 C.F.R. § 416.929; SSR 16-3p. To the extent that statements about the
21 intensity, persistence, or functionally-limiting effects of pain or other symptoms are not
22 substantiated by objective medical evidence, the ALJ must make a finding on the credibility of the
23 individual's statements based on a consideration of the entire case record. The ALJ must also
24 consider opinion evidence in accordance with the requirements of 20 C.F.R. § 416.927.

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27 ² SSRs constitute the Social Security Administration's official interpretations of the statute
28 it administers and its regulations. *See Bray v. Comm'r Soc. Sec. Admin.*, 554 F.3d 1219, 1224 (9th
Cir. 2009). They are entitled to some deference as long as they are consistent with the Social
Security Act and regulations. *Id.*

1 The fourth step requires the ALJ to determine whether the individual has the residual
 2 functional capacity to perform his past relevant work (“PRW”). 20 C.F.R. § 416.920(f). PRW
 3 means work performed either as the individual actually performed it or as it is generally performed
 4 in the national economy within the last 15 years or 15 years prior to the date that disability must
 5 be established. 20 C.F.R. § 416.960(b). In addition, the work must have lasted long enough for
 6 the individual to learn the job and performed at SGA. 20 C.F.R. §§ 416.960(b), 416.965. If the
 7 individual has the RFC to perform his past work, then a finding of not disabled is made. 20 C.F.R.
 8 § 416.920(f). If the individual is unable to perform any PRW or does not have any PRW, then the
 9 analysis proceeds to the fifth and last step.

10 The fifth and final step requires the ALJ to determine whether the individual is able to do
 11 any other work considering his residual functional capacity, age, education, and work experience.
 12 20 C.F.R. § 416.920(g). If he is able to do other work, then a finding of not disabled is made. The
 13 Commissioner is responsible for providing evidence that demonstrates that other work exists in
 14 significant numbers in the national economy that the individual can do. *Lockwood v. Comm’r Soc.*
 15 *Sec. Admin.*, 616 F.3d 1068, 1071-1072 (9th Cir. 2010).

16 **II. BACKGROUND**

17 A. Procedural History

18 On February 24, 2015, Plaintiff protectively applied for disability insurance benefits under
 19 Title II and supplemental security income under Title XVI, alleging a disability onset date of
 20 January 31, 2015. Administrative Record (“A.R.”) 199-202, 203-211. Plaintiff’s application was
 21 denied initially and on reconsideration. A.R. 120-123, 131-136. On July 27, 2017, Plaintiff,
 22 Plaintiff’s attorney, and a vocational expert appeared for a hearing before ALJ Gary L.
 23 Vanderhoof. A.R. 34-43. On November 13, 2017, the ALJ issued a decision finding Plaintiff not
 24 disabled. A.R. 34-43. Plaintiff requested review of the ALJ’s decision by the Appeals Council
 25 but, on October 3, 2018, the Appeals Council denied the request, making the ALJ’s decision the
 26 final decision of the Commissioner. A.R. 1-4. On December 7, 2018, Plaintiff commenced this
 27 action for judicial review pursuant to 42 U.S.C. § 405(g) and 1383(c)(3). *See* Docket No. 1.

28 . . .

1 **B. The ALJ's Decision**

2 The ALJ followed the five-step sequential evaluation process set forth in 20 C.F.R.
3 404.1520 and issued an unfavorable decision on November 13, 2017. A.R. 34-43. At step one,
4 the ALJ found that Plaintiff meets the insured status requirement of the Social Security Act through
5 September 30, 2020, and has not engaged in substantial gainful activity since January 31, 2015,
6 the alleged onset date. A.R. 36. At step two, the ALJ found that Plaintiff has the following severe
7 impairments: degenerative disc disease and degenerative joint disease of the knees. A.R. 36-37.

8 At step three, the ALJ found that Plaintiff does not have an impairment or combination of
9 impairments that meets or medically equals the severity of one of the listed impairments in 20
10 C.F.R. Part 404, Subpart P, Appendix 1. A.R. 37-38. The ALJ found Plaintiff has the RFC to
11 perform light work as defined in 20 C.F.R. 404.1567(b) and 416.967(b) except that she can
12 occasionally lift, carry, push, and pull twenty pounds; frequently lift, carry, push, and pull ten
13 pounds; stand or walk two hours in an eight-hour day; sit six hours in an eight hour day; never
14 climb ladders, ropes, or scaffolds; and never work at unprotected heights or around dangerous
15 moving machinery. A.R. 38-41.

16 At step four, the ALJ found that Plaintiff is unable to perform any past relevant work. A.R.
17 41-42. At step five, the ALJ found that, considering Plaintiff's age, education, work experience,
18 and RFC, jobs exist in significant numbers in the national economy that Plaintiff can perform.
19 A.R. 42-43. Therefore, the ALJ found that Plaintiff was not disabled from January 31, 2015,
20 through the date of the decision. A.R. 43.

21 **III. ANALYSIS AND FINDINGS**

22 **A. Plaintiff's Literacy Level**

23 Plaintiff submits that the ALJ relied on a job description in the Dictionary of Occupational
24 Titles ("DOT"), but failed to definitively explain the impact of the claimant's illiteracy on her
25 ability to find and perform a similar job. Docket No. 18 at 8. Plaintiff submits that evidence exists
26 in the record demonstrating that she was in special education classes in school, received a modified
27 diploma, and is "functionally illiterate." *Id.* Plaintiff further submits that, when an ALJ relies on
28 a job description in the DOT, the ALJ must definitively explain the impact of the claimant's

1 illiteracy on her ability to find and perform a similar job, but the ALJ failed to address the issue of
2 her literacy during the hearing or in his decision. *Id.* at 8-9. Finally, Plaintiff submits that, given
3 her age, modified diploma, functional illiteracy, and lack of transferrable skills, in conjunction
4 with the ALJ's RFC finding limiting her to standing and walking for no more than 2 hours in an 8
5 hour day, a limitation to sedentary work would have resulted in a finding of disability based on 20
6 C.F.R. § 404. *Id.* at 9.

7 In response, the Commissioner submits that Plaintiff's argument regarding the ALJ's
8 consideration of her limited literacy has been administratively waived due to Plaintiff's failure to
9 timely raise the issue at the administrative hearing. Docket No. 21 at 3. The Commissioner
10 submits that, when a claimant is represented by counsel, she must raise all issues and evidence at
11 her administrative hearing in order to preserve them on appeal. *Id.* The Commissioner further
12 submits that Plaintiff's counsel failed to raise the issue of her limited literacy during the vocational
13 expert's testimony and further failed to question the vocational expert about how Plaintiff's
14 illiteracy would affect her ability to perform the sample jobs the vocational expert identified. *Id.*
15 at 4. Additionally, the Commissioner submits that, while Plaintiff's literacy is limited, she is not
16 wholly illiterate and she previously worked for 27 years as a bus person, which has a DOT
17 language level one description. *Id.* Finally, the Commissioner submits that the jobs identified by
18 the vocational expert only require language level one, the same literacy level at which Plaintiff
19 worked for 27 years. *Id.*

20 In reply, Plaintiff submits that she did not waive the issue of her literacy because her
21 counsel properly raised the issue by submitting evidence, including the test results from the Bureau
22 of Vocational Rehabilitation, demonstrating her functional illiteracy. Docket No. 24 at 2. Plaintiff
23 additionally submits that it was the ALJ's responsibility to determine her education level and
24 literacy as part of the normal course of deciding whether Plaintiff is disabled and to explain the
25 impact of her illiteracy on her ability to find and perform a job. *Id.* Further, Plaintiff submits that,
26 despite her testimony that she took special education classes and completed high school with a
27 modified diploma, the ALJ did not ask if she could read or write and the ALJ's opinion fails to
28 discuss Plaintiff's background in special education, low IQ, modified diploma, or inability to read

1 or write. *Id.* at 2-3. Finally, Plaintiff submits that the ALJ's RFC finding, in combination with her
2 age, modified diploma, functional illiteracy, lack of transferable skills, and limitation to sedentary
3 work should have resulted in a finding of disability. *Id.* at 3.

4 In *Pinto v. Massanari*, 249 F.3d 840, 847 (9th Cir. 2001), the Court held that an ALJ is
5 required to definitively explain the impact of the claimant's illiteracy on the claimant's ability to
6 find and perform a similar job. The Court further found that, when an ALJ relies on a job
7 description in the DOT that fails to comport with a claimant's noted limitations, the ALJ must
8 definitively explain this deviation. *Id.*

9 In this case, the Court finds that Plaintiff was represented by counsel at the hearing. In a
10 Social Security benefits case, where a claimant is represented by counsel, the claimant must raise
11 all issues and evidence at her administrative hearing in order to preserve them on appeal. *Meanel*
12 *v. Apfel*, 172 F. 3d 1111, 1115 (9th Cir. 1999). While Plaintiff included evidence of the particulars
13 of her education and literacy level in the record, the issue was not raised at the administrative
14 hearing and, therefore, is waived.

15 Even if Plaintiff had not waived this issue, however, her case is distinguishable from *Pinto*.
16 Plaintiff is not wholly illiterate. Moreover, the ALJ found that Plaintiff has a high school education
17 and is able to communicate in English. A.R. 42. The record also indicates that Plaintiff worked
18 previously as a bus person, which has the same language level as the jobs identified by the
19 vocational expert. A.R. 42, 53, 58, 62.

20 Accordingly, the Court finds that the ALJ did not err with respect to the issue of Plaintiff's
21 literacy.

22 B. Plaintiff's Testimony

23 Plaintiff next submits that the ALJ improperly rejected her testimony regarding her medical
24 impairments. Docket No. 18 at 9-12. Plaintiff submits that the ALJ failed to provide specific,
25 clear, and convincing reasons to support rejecting her testimony. *Id.* at 10. Plaintiff submits that,
26 while the ALJ pointed to inconsistencies between Plaintiff's testimony and the objective medical
27 evidence, the record shows that Plaintiff has tried a variety of interventions and that those
28 interventions qualify as significant treatment. *Id.* Plaintiff submits that the ALJ's finding that her

1 daily activities are limited, but cannot be “objectively verified” is insufficient for rejecting her
2 testimony; instead, the ALJ must provide specific reasons to discount her testimony. *Id.* at 10-11.
3 Finally, Plaintiff submits that the ALJ improperly compared Plaintiff’s application paperwork with
4 her testimony. *Id.* at 11-12.

5 In response, the Commissioner submits that substantial evidence supports the ALJ’s
6 finding that Plaintiff’s testimony was not entirely consistent with the medical records. *Id.* Docket
7 No. 21 at 5-8. The Commissioner submits that the ALJ first considered that the unchallenged
8 medical evidence failed to support Plaintiff’s subjective allegations of disabling symptoms. *Id.* at
9 5-6. Additionally, the Commissioner submits that the ALJ considered Plaintiff’s activities of daily
10 living, including that Plaintiff experienced no problems maintaining personal care such as
11 dressing, bathing, grooming, shaving, feeding herself, driving, shopping, preparing meals, and
12 performing housework. *Id.* at 7. Further, the Commissioner submits that the ALJ properly
13 discounted Plaintiff’s allegations of an inability to work because Plaintiff admitted that she stopped
14 working because “she doesn’t want to work,” not because of any disability. *Id.* The Commissioner
15 submits that the ALJ reasonably considered Plaintiff’s testimony and found it not entirely
16 consistent with the unchallenged medical evidence in the record. *Id.* at 7-8.

17 In reply, Plaintiff submits that the ALJ failed to identify any specific part of the medical
18 evidence which contradicts Plaintiff’s testimony. Docket No. 24 at 3-4. Plaintiff additionally
19 submits that the ALJ erred when using boilerplate language to reject her allegations of disability
20 because the ALJ failed to provide evidence, based on the record, which demonstrates that Plaintiff
21 has greater functional abilities than she alleged. *Id.* at 4.

22 A claimant’s statements as to symptoms cannot, alone, be conclusive evidence of disability.
23 42 U.S.C. § 423(d)(5)(A); *see also fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). An ALJ is
24 required to make findings as to the veracity of the claimant’s subjective statements. *Thomas v.*
25 *Barnhart*, 278 F.3d 947, 958-959 (9th Cir. 2009). Therefore, in determining whether a claimant’s
26 testimony regarding subjective pain or symptoms is credible, an ALJ must engage in a two-step
27 analysis. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007). First, the ALJ must
28 determine whether the claimant has presented objective medical evidence of an underlying

1 impairment which could reasonably be expected to induce the pain. *Id.* at 1036. Once a claimant
2 establishes an underlying impairment, the ALJ must then evaluate whether the statements about
3 the severity of the symptoms are consistent with (1) the objective medical evidence; and (2) the
4 other evidence in the record. 20 C.F.R. § 404.1529(c)(2)-(3). It is the ALJ's prerogative to analyze
5 whether and, to what extent, the claimant's statements about symptoms are consistent with the
6 record. *Molina v. Astrue*, 674 F.3d 1104, 1120-21 (9th Cir. 2012). The ALJ's assessment of the
7 subjective claims must be properly supported by the record and sufficiently ensure a reviewing
8 court that the ALJ did not arbitrarily discount a claimant's subjective testimony. *Id.* In weighing
9 a claimant's testimony, the ALJ may consider numerous factors including duration, frequency, and
10 intensity of pain as well as medication and "ordinary techniques of credibility evaluation." *Bunnell*
11 *v. Sullivan*, 947 F.2d 341, 346 (9th Cir. 1991). The ALJ may also consider discrepancies in a
12 claimant's statements, exaggerated complaints, and inconsistencies between a claimant's
13 statements and activities. *Thomas*, 278 F.3d at 958.

14 Here, the ALJ found that, while Plaintiff has severe impairments and her medically
15 determinable impairments could reasonably be expected to produce some of the alleged symptoms,
16 Plaintiff's subjective allegations regarding the intensity, persistence, and limiting effects of the
17 symptoms are not consistent with the medical evidence and other evidence in the record. A.R. 41.
18 The ALJ found that Plaintiff's allegations of disability were inconsistent with her daily activities.
19 A.R. 38. The ALJ further found that Plaintiff has no problems maintaining her personal care,
20 preparing meals, cleaning, washing laundry, driving, and shopping. A.R. 38.

21 Additionally, the ALJ found that the objective medical findings fail to provide strong
22 support for Plaintiff's testimony. A.R. 39. While the record contained Plaintiff's complaints of
23 pain or stiffness, her medical status examinations in March 2015, October 2015, and September
24 2016 otherwise indicated that she was in no acute distress, had little or no back tenderness, had
25 full range of motion of her extremities, and had no deformities, edema, or erythema. A.R. 39-40.
26 The ALJ further found that pain management and physical therapy sessions were successful, and
27 that Plaintiff had good exercise activity tolerance and that she reported feeling better. A.R. 40.

1 Finally, Plaintiff stated during her administrative hearing that “she doesn’t want to work,”
2 and that she stopped working because she quit and not because of any disability. A.R. 288. An
3 ALJ properly rejects a claimant’s allegations of an inability to work when a claimant stopped
4 working for reasons unrelated to their alleged disability. *See Bruton v. Massanari*, 268 F.3d 824,
5 828 (9th Cir. 2001); *see also Drouin v. Sullivan*, 966 F.2d 1255, 1258-59 (9th Cir. 1992).

6 Accordingly, based on a review of the entire record, the Court finds that the ALJ properly
7 discounted Plaintiff’s testimony.

8 C. Step Five Finding

9 Plaintiff submits that the ALJ’s step five finding is not supported by substantial evidence.
10 Docket No. 18 at 12. Plaintiff submits that the ALJ accepted the opinions of the state agency
11 reviewing doctors, who opined that she is limited to sedentary work, but the ALJ accepted two
12 jobs that are inconsistent with those limitations and improper for someone of Plaintiff’s limitations.
13 *Id.* at 12-13. Plaintiff further submits that the ALJ erred when relying on vocational expert
14 testimony that conflicts with the agency’s administrative noticed resources, unless the record
15 contains “persuasive evidence” to support the deviation. *Id.* at 13. Finally, Plaintiff submits that
16 the ALJ improperly omitted Plaintiff’s allegations when posing hypothetical questions to the
17 vocational expert. *Id.*

18 In response, the Commissioner submits that the ALJ’s RFC finding that Plaintiff was
19 capable of a limited range of light exertion work, based on her lifting and carrying ability, was
20 proper under the Regulatory definitions. Docket No. 21 at 8. The Commissioner submits that the
21 ALJ found that Plaintiff can lift or carry 20 pounds occasionally and 10 pounds frequently, and
22 that Plaintiff’s ability to stand or walk for two hours in an eight-hour workday did not reduce her
23 exertional ability to that of sedentary work, but rather limited her to a range of light work. *Id.* The
24 Commissioner further submits that the ALJ did not err in adopting the vocational expert’s
25 identified jobs because the ALJ properly found Plaintiff’s RFC to be light. *Id.*

26 In reply, Plaintiff submits that, though the ALJ’s RFC finding is labeled “light,” it is more
27 consistent with a limitation to sedentary work. Docket No. 24 at 5. Plaintiff submits that the
28 vocational expert acknowledged that the occupation of hand packager is a medium level job but

1 asserted, without specification, that a certain percentage of the jobs exist at the sedentary level. *Id.*
2 Plaintiff additionally submits that the ALJ's RFC finding is inconsistent with more than sedentary
3 work and differs from the opinions of the state agency reviewing doctors, who limited Plaintiff to
4 sedentary work. *Id.* Plaintiff further submits that the vocational expert did not give any reason for
5 offering testimony contrary to the information contained in the DOT. *Id.* at 6. Finally, Plaintiff
6 submits that the ALJ omitted Plaintiff's credible allegations and the limitations assessed by
7 Plaintiff's treating medical sources when posing hypothetical questions to the vocational expert.
8 *Id.*

9 The ALJ may satisfy the step five burden through vocational expert testimony. *Osenbrock*
10 *v. Apfel*, 240 F.3d 1157, 1162 (9th Cir. 2001). Where the ALJ uses testimony of a vocational expert
11 at step five, the vocational expert must identify specific jobs in the national economy having
12 requirements that the claimant's physical and mental abilities and vocational qualifications would
13 satisfy. *Id.* at 1162-1163. Hypothetical questions posed to the vocational expert must set out all
14 the limitations and restriction of the particular claimant. *Embrey v. Bowen*, 849 F.2d 418, 423 (9th
15 Cir. 1988).

16 Here, Plaintiff contends that the ALJ's RFC finding should have been sedentary, in part
17 because of the reviewing doctors' opinions and in part because of the vocational expert's
18 testimony. Docket No. 18 at 12-14. The ALJ gave great weight to the opinion of the reviewing
19 state agency medical consultant, Dr. Pena, who found that Plaintiff can occasionally lift carry,
20 push, and pull twenty pounds; frequently lift, carry, push and pull ten pounds; stand or walk two
21 hours in an eight-hour day; sit six hours in an eight hour day; occasionally climb ramps and stairs;
22 never climb ladders, ropes or scaffolds; frequently balance and stop; never kneel, crouch, and
23 crawl; and avoid concentrated exposure to extreme cold, vibration, and hazards including
24 machinery and heights. A.R. 40. Additionally, the ALJ gave great weight to Dr. Leonard
25 Simpson's opinion, which affirmed Dr. Pena's opinion, except that he opined that Plaintiff could
26 occasionally stoop. A.R. 40. Accordingly, the ALJ posed a hypothetical to the vocational expert
27 to identify jobs which Plaintiff could perform given her limitations, based in part upon the opinions
28 of the state agency doctors. A.R. 41-42, 61-62. The vocational expert identified two jobs, small

parts assembly and hand packager, that Plaintiff is capable of performing with her limitations. A.R. 42. The ALJ did not classify Plaintiff's RFC as sedentary; rather, the ALJ classified Plaintiff as able to do light work pursuant to 20 C.F.R. 404.1567(b) and 416(b). A.R. 38. Further, the ALJ was not required to include the hypothetical limitations based on Plaintiff's subjective allegations because the ALJ found that these limitations were not supported by the overall evidence in the record and, therefore, discounted these limitations. A.R. 39-40; *see also Osenbrock v. Apfel*, 240 F.3d 1157, 1162 (9th Cir. 2001).

Accordingly, having reviewed the entire record, the Court finds that the ALJ did not err in the step five finding that Plaintiff was not disabled.

IV. CONCLUSION

For these reasons, the undersigned concludes that the ALJ's findings are supported by substantial evidence and, therefore, that he did not err in finding that Plaintiff is not disabled. Accordingly, the undersigned hereby **RECOMMENDS** that Plaintiff's motion for reversal and/or remand, Docket No. 18, be **DENIED** and that the Commissioner's countermotion to affirm, Docket No. 21, be **GRANTED**.

Dated: August 9, 2019


NANCY J. KOPPE
United States Magistrate Judge

NOTICE

Pursuant to Local Rule IB 3-2 **any objection to this Report and Recommendation must be in writing and filed with the Clerk of the Court within 14 days of service of this document.**

The Supreme Court has held that the courts of appeal may determine that an appeal has been waived due to the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also held that (1) failure to file objections within the specified time and (2) failure to properly address and brief the objectionable issues waives the right to appeal the District Court's order and/or appeal factual issues from the order of the District Court.

1 *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley Unified Sch. Dist.*, 708
2 F.2d 452, 454 (9th Cir. 1983).